

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JUL 16 1968

UNITED STATES OF AMERICA, )  
)  
Appellant, )  
) No. 22,719  
)  
vs. )  
)  
FRANK RAY SELBY, )  
STEVEN ARTHUR CLARK, )  
PAUL EVANS CARBONE, )  
CAROL MELANI PALMIERI, )  
and CLAUDE ROSE FODOR, )  
)  
Appellees. )

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ON APPEAL FROM AN ORDER OF  
THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

OPENING BRIEF OF APPELLEE

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Santa Ana, California

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25

26







1 which time they entered pleas of not guilty and the matter  
2 was set for preliminary examination on November 3, 1967. Ap-  
3 pellees Fodor and Palmieri were released on November 1, 1967  
4 on personal surety bonds. On November 3, 1967, preliminary  
5 examination was started before Raymond Terlizzi, U.S. Com-  
6 missioner, at which time evidence was introduced on behalf of  
7 the Government and the preliminary examination recessed.  
8 Over the objection of all appellees and their counsel the  
9 hearing was continued to November 9, 1967, at the request of  
10 the Government. On November 8, 1967, an indictment was re-  
11 turned by the Federal grand jury. RC Item 1.

12 The Indictment, in two counts, charged all Appellees in  
13 Count I with having formed a conspiracy sometime prior to  
14 October 27, 1967, and continuing thereafter until on or about  
15 October 27, 1967, at Lukeville, State and District of Arizona  
16 and elsewhere to import, receive, conceal, buy, sell and fa-  
17 cilitate the transportation, concealment and sale of approxi-  
18 mately 332 pounds of bulk marijuana after the said marijuana  
19 had been brought into the United States of America from Mex-  
20 ico contrary to law, knowing the same had been imported and  
21 brought into the United States contrary to law; all in vio-  
22 lation of 21 U.S.C. 176a. The second count charged Selby  
23 and Palmieri with having knowingly and with intent to defraud  
24 the United States of America, imported approximately 332  
25 pounds of bulk marijuana contrary to law at Lukeville, Ari-  
26 zona, all in violation of 21 U.S.C. 176a (RC Item I).

On November 17, 1967, Selby, Clark, and Carbone filed a  
motion to reduce bail. (RC Item 9, docket entries) (On No-  
vember 1, 1967, Fodor and Palmieri were released on personal  
surety bonds.) On November 20, 1967, all Appellees were ar-  
raigned, pleaded not guilty, were allowed ten days for Mo-  
tions, and the said motion was denied. (RC Item 9) Trial was  
set for December 27, 1967. On December 5, 1967, Appellees  
filed a Motion to Continue. (RC Item 9) On December 8, 1967,





1 the Government filed a Memorandum in Opposition and on Decem-  
2 ber 11, 1967, the Motion was denied. (RC Item 9) On December  
3 6, 1967, Clark was released on \$10,000 bond secured by a 10%  
4 deposit and on December 11, 1967, Carbone was released on  
5 \$10,000 bond secured by a 10% deposit. (RC Item 9) On Decem-  
6 ber 22, 1967, Appellees filed a Motion for Return of Proper-  
7 ty and to Suppress. (RC Item 2) On December 27, 1967, the  
8 Government filed a Memorandum in Opposition and the Motion  
9 was heard. (RC Item 4 and 9) The Trial Court granted the  
10 motion, and the Government moved to reduce Selby's bail to  
11 \$10,000 personal surety and was released. (RC Item 9) The  
12 Government filed Notice of Appeal on January 26, 1968 (RC  
13 Item 6), and avowed the purpose of the Appeal is not for de-  
14 lay. (RC Item 6, L 20-21)

15 The Trial Court had jurisdiction of the case by reason of  
16 of the provisions of 18 U.S.C.A. 3231. The Government is  
17 authorized to appeal orders granting motions to suppress by  
18 the provisions of 28 U.S.C.A. 1294 (1).

## 19 II

### 20 STATEMENT OF FACTS

21 On October 27, 1967, appellees Selby and Palmieri drove  
22 their camper to the Port of Entry, Lukeville, Arizona. After  
23 inspection of their vehicle by Inspector McKeown, they were  
24 admitted into the United States. The customs agent testified  
25 that Mr. Selby asked him where they could locate a notary as  
26 it was necessary to secure an affidavit of ownership prior to  
re-entering Mexico. The agent directed them to a notary and  
they drove off in that direction. (RT 53-61)

At about this time Willis Ramsey, the Port Director, re-  
turned from lunch and along with Inspector McKeown, conducted  
the search of the Clark Volkswagon, which was  
waiting to enter the United States. Nothing was found as a  
result of the search and the vehicle was allowed to pass the  
border. Inside the Clark Volkswagon were Clark, Fodor, and



1 Carbone. (RT 61-64)

2 The Clark vehicle proceeded to a gas station on the  
3 west side of the highway while the area to which the Selby  
4 vehicle went is located on the east side of the highway. At  
5 no time was there ever any observation by anyone that the  
6 vehicles or their occupants ever met or communicated with  
7 each other. The Selby vehicle, after going to the notary,  
8 returned to the highway and went north. Approximately three  
9 to five minutes later the Volkswagon left the gas station and  
10 also headed north. (It should be noted that there is only  
11 one highway leaving Lukeville and it was on this road that  
12 both vehicles traveled). (RT 64-67) It was also at this  
13 time that Inspector McKeown talked over the matter of the  
14 camper traveling north instead of south as Mr. Selby had in-  
15 dicated was his intention. Inspector Ramsey thereupon phoned  
16 his supervisor in Nogales and talked to Mr. Hugh Marshall, an  
17 inspector for U.S. Customs Service. At that time Mr. Mar-  
18 shall told Mr. Ramsey that he believed Mr. Selby and Mr.  
19 Clark and Miss Fodor were subject to registration as narcotic  
20 violators and that they should be brought back to the border  
21 to allow them to register. Inspector Ramsey then radioed  
22 the Pima County Sheriff's station to intercept the vehicles  
23 and return them to Lukeville. The vehicles were then stopped  
24 by Deputy Sheriffs on the road to Ajo 45 minutes to one hour  
25 later and were escorted back to the border station. (RT 92-  
26 94)

21 Upon arrival at the border station the appellees were  
22 asked if they were subject to registration as narcotics vio-  
23 lators, and they stated that they were not. At that time,  
24 they were placed in a room under armed guard and the camper  
25 was again searched and contraband found. After finding the  
26 contraband in the Selby camper Inspector Ramsey telephoned  
Nogales of his findings and was told to arrest all the de-  
fendants. Mr. Ramsey stated that he would have released the



1 occupants of the Clark Volkswagon after finding the contra-  
2 band, but that the agent in Nogales told him to arrest every-  
3 one. (RT 116 L 12-20)

### 4 III

#### ARGUMENT

5 "Although the combination of facts necessary to consti-  
6 tute probable cause for making an arrest without a warrant  
7 is not a ststic concept, a continuing criterion is that ar-  
8 rests without a warrant will not be approved where an officer  
9 is stimulated by an inkling or suspicion only."

10 The vehicles were stopped by Deputy Sheriffs of Pima  
11 County, Arizona at the request of Customs Inspector Ramsey.  
12 (RT pg. 12-16) The reason the vehicles were stopped was be-  
13 cause Inspector Ramsey was told that the occupants were sub-  
14 ject to registration as narcotic violators pursuant to Title  
15 18 U.S.C.A. 1407. (RT pg. 93 L 16-20)

16 During the time the vehicles were in transit back to the  
17 border station Inspector Ramsey decided he would conduct a  
18 search of the Chevrolet camper. (RT pg. 100 L 16-20)

19 Upon arrival at the border station the appellees were  
20 asked if they were subject to registration pursuant to Title  
21 18 U.S.C.A. 1407 and they stated no. (RT pg. 100 L 16-20)

22 The appellees were then placed in a room at the border  
23 station under armed guard and a search without warrant or  
24 consent was made of the Selby camper. (RT pg. 33-35)

25 After finding contraband in the Selby vehicle Agent  
26 Ramsey again called Nogales and was told to arrest everyone  
in both vehicles otherwise he would have let the people in  
the Clark vehicle leave. (RT pg. 116 L 12-20)

The stopping of the vehicles constitutes an arrest.  
Henry v. U.S. (1959) 361 U.S. 98, 4 L. ED<sub>2</sub> 134, 80 S. Ct. 168

The fourth amendment of the U.S. Constitution states;  
"the right of the people to be secure in their persons,  
houses, papers and effects against unreasonable searches and



1 seizures, shall not be violated and no warrants shall issue  
2 but upon probable cause supported by oath or affirmation and  
3 particularly describing the place to be searched and the  
4 person or things to be seized".

5 In *Giordanello v. U.S.* 357 U.S. 480, 2 LED.1503, 78 S.  
6 Ct. 1245 it was held that the same standard applies to ar-  
7 rest warrants as to search warrants.

8 The only evidence Inspector Ramsey had that appellees  
9 were violating the law was that he was told four of the oc-  
10 cupants of the two vehicles were possibly subject to regis-  
11 tration under Title 18 U.S.C.A. 1407 and that Mr. Selby had  
12 gone north from the border station instead of returning south  
13 into Mexico. He (Ramsey) had no prior knowledge or informa-  
14 tion that anyone answering to those names or vehicles of that  
15 description were engaged in the importation of narcotics into  
16 the United States. (RT pg. 96 L 12-19)

17 The arrest of the appellees was illegal as it was made  
18 without probable cause.

19 "Neither search warrants nor arrest with or without war-  
20 rant can be made without personal knowledge of officer ap-  
21 plying for warrant or making the arrest of facts that would  
22 be competent in trial for the offense before the jury."  
23 *Worthington v. U.S.* (6th Cir. (1948), 166 F2 557

24 "Existence of probable cause, warranting arrest of per-  
25 son believed to have committed felony must be determined by  
26 existence of facts known to officer before arrest. Mere sus-  
27 picion is not enough to constitute grounds for arrest with-  
28 out warrant." *Poldo v. U.S.* (9th Cir. 1932), 55 F2 866

29 "Common rumor or report, suspicion or even strong reason  
30 to suspect is not adequate to support a warrant of arrest."  
31 *Henry v. U.S.*, supra

32 The evidence seized as a result of the search of the  
33 Selby vehicle should be suppressed since the search was in-  
34 cident to an unlawful arrest.





1 "On showing that arrest was merely a pretext for search,  
2 evidence thus obtained must be suppressed." Worthington v.  
3 U.S., supra

4 "In determining probable cause for justifying an arrest  
5 without a warrant the fact that contraband was afterwards  
6 discovered is not sufficient since an arrest is not justified  
7 by what the subsequent search discloses." Henry v. U.S.,  
8 supra

9 Warrants are required for search by customs inspectors  
10 if they have cause to believe that contraband is within a  
11 building, store or dwelling house, Title 19 U.S.C.A. 1595

12 There is no provision of the law that excepts Customs  
13 officers from the requirements of the fourth amendment of  
14 the United States Constitution.

15 In the Bailey case (5th cir. 1967) 386F<sub>2</sub> 1 cited by ap-  
16 pellant in its brief, the officers had information regarding  
17 the vehicle defendant was in, the vehicle was seen to travel  
18 into an area used for the trafficking of narcotics, and when  
19 the vehicle pulled off the roadway on its own and when officers  
20 approached they saw the defendant throw away a package  
21 containing narcotics the court held this was sufficient to  
22 constitute probable cause.

23 In the instant case the court is faced with an entirely  
24 different situation. There was no informant nor information  
25 known by Mr. Ramsey or Mr. Marshall regarding narcotic acti-  
26 vity, only a vague request to have the vehicles returned to  
the border so that the opportunity to register pursuant to  
Title 18 U.S.C.A. 1407 be given the occupants. Since the  
trial court fejected the theory of border search the burden  
is on the government to show probable cause for the arrest of  
the appellees. The trial court felt that this was not done  
and granted the appellees Motion for Return of property and  
to Suppress Evidence.

In U.S. V. Walker (7th Cir. 1957) 246F<sub>2</sub> 519 the court



1 stated an inkling or suspicion alone will not justify an ar-  
2 rest without warrant.

3 IV  
4 CONCLUSION

5 Appellees respectfully urge this court to find no pro-  
6 bable cause existed for their arrest and that the Order  
7 granting their Motion for Return of Property and to Suppress  
8 Evidence should be affirmed.

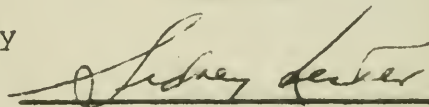
9 Respectfully submitted  
10 Sidney Lester

11 Santa Ana  
12 George Chula

13 Santa Ana  
14 William Berlat

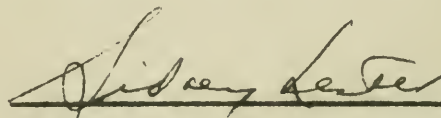
15 Tuscon

16 By

17 

18 Attorney for Appellees

19 I certify that, in connection with the preparation of  
20 this Brief, I have examined Rules 18, 19 and 39 of the United  
21 States Court of Appeals for the Ninth Circuit, and that in my  
22 opinion, the foregoing Brief is in full compliance with those  
23 rules.

24 

25 Sidney Lester  
26



1 STATE OF CALIFORNIA)  
2 COUNTY OF ORANGE ) ss.

3 I am a citizen of the United States and a resident of  
4 the county aforesaid; I am over the age of eighteen years and  
5 not a party to the within action; by business address is:

6 522 South Broadway  
7 Santa Ana, California

8 On July 15, 1968, I served the within Opening Brief of  
9 Appellee to be mailed to:

10 Edward E. Davis, Esq.  
11 United States Attorney  
12 P. O. Box 1951  
13 Tuscon, Arizona 85702

14 I declare under penalty of perjury that the foregoing  
15 is true and correct.

16 Executed on July 15, 1968 at Santa Ana, California.

17 Licki Cofer  
18  
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